

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
DAWANE ARTHUR MALLETT,  
  
Defendant.

No. 2:02-cr-00416-TLN

**ORDER**

This matter is before the Court on remand from the Ninth Circuit. (ECF No. 390.) Defendant appealed this Court’s January 6, 2021 order (ECF No. 383) denying his motion brought pursuant to Federal Rule of Civil Procedure (“Rule”) 60(b), in which he sought to vacate a prior order (ECF No. 353) denying his motion brought pursuant to 28 U.S.C. § 2255 (“§ 2255”). (ECF No. 384.) The Ninth Circuit remanded this matter “for the limited purpose of granting or denying a certificate of appealability” as to the Rule 60(b) motion. (ECF No. 390 at 1.)

In its prior order, this Court found that Defendant’s motion (ECF No. 379) was a § 2255 motion “in disguise” — not a true Rule 60(b) motion — and dismissed the motion for lack of jurisdiction as an unauthorized successive § 2255 motion. (ECF No. 383 at 2 (citing *United States v. Washington*, 653 F.3d 1057, 1063–64 (9th Cir. 2011).) The Court also noted even if it were to construe Defendant’s motion as a Rule 60(b) motion, such a motion was untimely. (*Id.* at 3.) More specifically, the Court emphasized that Defendant failed to explain his delay in bringing

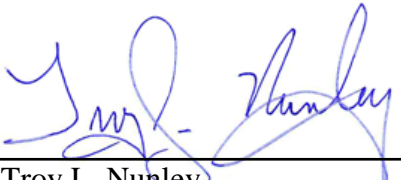
the so-called Rule 60(b) motion 17 years after his conviction and almost 10 years after the denial of the § 2255 motion at issue. (*Id.* (citing Fed. R. Civ. P. 60(c) (“A motion under Rule 60(b) must be made within a reasonable time.”))).)

Construing Defendant’s motion as a § 2255 motion, a certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). In the instant case, Defendant has not made a substantial showing of the denial of a constitutional right. Even if Defendant’s motion is construed as a Rule 60(b) motion, the Court still declines to grant a certificate of appealability. A certificate of appealability “should only issue for the appeal arising from the denial of a Rule 60(b) motion in a [§] 2255 proceeding if the movant shows that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion and (2) jurists of reason would find it debatable whether the underlying [§] 2255 motion states a valid claim of the denial of a constitutional right.” *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015). Not only has Defendant failed to show a “debatable” denial of a constitutional right in the underlying § 2255 motion, but he has also failed to show that the Court abused its discretion in denying Defendant’s Rule 60(b) motion as untimely.

Accordingly, the Court declines to grant a certificate of appealability. The Clerk of Court is directed to serve a copy of this Order on the Ninth Circuit Court for USCA Case Number 21-15166.

IT IS SO ORDERED.

DATED: April 22, 2021

  
 Troy L. Nunley  
 United States District Judge